UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/529
21 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 529

Case No. 558: DEY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Luis de Posadas Montero;

Whereas at the request of Bimal Kanti Dey, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1990 the time-limit for the filing of an application to the Tribunal;

Whereas, on 5 July 1990, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Applicant respectfully requests that the UNAT [United Nations Administrative Tribunal] order and/or take the following measures and decisions:

1 - That the decision by the SG [Secretary-General] to dismiss Mr. Dey, contrary to the unanimous recommendation made by JDC [Joint Disciplinary Committee] Geneva, be rescinded and that he be restored to his permanent contract position with UNOG [United Nations Office at Geneva], will full pay, allowances and other benefits and with retroactive effect to the date of his suspension.

2 - If the Tribunal does not order No. 1 above, that Mr. Dey's dismissal be remanded for reconsideration by an appropriate disinterested representative of the SG.

3 - If the Tribunal finds that the application is well founded but does not order the relief requested above, that the Respondent be ordered to pay compensation to the Applicant amounting to two years of this net base salary.

4 - If the Tribunal acts under Nos. 1-3 above, that the Respondent be ordered to compensate the Applicant with an additional amount the Tribunal considers appropriate for the sufferings of the Applicant related to the case."

Whereas the Respondent filed his answer on 20 November 1990;

Whereas the Applicant filed written observations on 21 December 1990;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Office at Geneva on 23 October 1972 under a short-term appointment which was converted on 1 November 1973 to a fixed-term appointment as a clerk at the G-2 level. He was granted a probationary appointment on 1 November 1975 and a permanent appointment on 1 November 1976. On 1 January 1977 he was promoted to the G-3 level and, on 1 April 1980, he was promoted to the G-4 level as a codifier. On 5 January 1981 the Applicant became Assistant Supervisor in the Mailing Unit and, on 22 November 1983, he was assigned as a senior clerk to the Visa Subunit, where one of his principal functions consisted of establishing, renewing and cancelling United Nations Laissez-Passer. On 7 September 1987 he was transferred back to the Registry, Records and Mailing Section.

On 2 June 1988 the Applicant was involved in an incident which the Joint Appeals Board has described as follows:

"8. In May 1988, the Appellant contacted Mr. G. Benitez (a colleague in the Visa Subunit) and requested the latter's assistance to use facilities in the Visa Subunit for establishing for himself a red UNLP [United Nations Laissez-Passer] which he had retained in his possession from the time of his employment in the Visa Subunit. Mr. Benitez reported this to his superiors who informed Mr. A. Ciss, Director, Division of Administration.

9. A meeting then took place in the office of Mr. Ciss, at which it was decided to authorize Mr. Benitez to provide the Appellant with the facilities requested.

10. Subsequently, it was arranged between Mr. Benitez and the Appellant to meet in the Visa Subunit (office No. 66) at around 6.00 p.m. on 1 June 1988 in order for the Appellant to establish the UNLP in his possession. In the meantime, Mr. R. Neild, Chief, Security and Safety Unit, was informed of this matter, and assigned two security officers to conduct a surveillance of office No. 66 from 5:45 p.m. on 1 June 1988. The Appellant, however, did not show up on the agreed time and date. Consequently, it was arranged between Mr. Benitez and the Appellant that they would meet instead on 2 June 1988 at the same time and place. The two security officers were again instructed to continue their surveillance of office No. 66.

11. On 2 June 1988, at the appointed time, when the Appellant again did not show up, Mr. Benitez, in agreement with Mr. K. Herrel, Chief, Purchase, Transportation and Internal Services Section, telephoned the Appellant at home and reproached him for not keeping the 'rendez-vous'. The Appellant said he would come immediately, which he did.

12. Upon entering office No. 66, the Appellant seated himself in front of the typewriter especially used for the issuance of UNLPs and asked Mr. Benitez for the code of the machine, even though he partially knew the code. After giving the code, Mr. Benitez left the room to signal the action of the Appellant. A few minutes later, the two security officers accompanied by Messrs. Herrel and Vigne [Chief, Transportation, Travel and Housing Unit], entered the room and found the Appellant sitting at the typewriter used for issuing UNLPs. On the typewritter was a partially completed red UNLP in the Appellant's name bearing the title 'Public Relations Officer'. Next to the typewriter was a passport photo of the Appellant. Mr. Vigne then took possession of the UNLP. When asked what he was doing, the Appellant said that he was fabricating himself a 'souvenir' of his employment with the Organization and, while saying so, he took the UNLP from Mr. Vigne's hand and tore the first two pages. Immediately thereafter, the two security officers accompanied the Appellant to his office in the Registry, Records and Mailing Section and examined the contents of his drawers. The Appellant was then permitted to go home and was told to report to the Security and Safety Unit the following day in order to make a full statement.

13. On 3 June 1988, Mr. Ciss transmitted to Mr. J. Martenson, Director-General, the report of the Security and Safety Unit on the incident, together with the statements of the Appellant and Mr. Benitez, and recommended the Appellant's immediate suspension from service with full pay under

> staff rule 110.4. In a memorandum of 6 June 1988, Mr. F. Villanueva, Chief, Personnel Service, informed the Appellant of the charges brought against him and the decision of the Director-General to suspend him from service with full pay under staff rule 110.4. Also, on 6 June 1988, Mr. Ciss reported the incident to Mr. K. Annan, Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) and requested OHRM's decision on this matter within the context of Article X of the Staff Regulations."

In a memorandum dated 10 June 1988, the Officer-in-Charge of the Division of Personnel Administration, Office of Human Resources Management (OHRM), presented the Applicant with the following charges of "serious misconduct":

> "It would appear that you (a) retained for your own benefit an official United Nations identification and travel document; (b) falsified an official United Nations inventory control record, and (c) attempted to manufacture in your own name and for your own benefit a fraudulent United Nations red Laissez-Passer. These acts would appear to be in violation of your obligations as a staff member under Article 1 of the Staff Regulations, a violation of the standards of conduct of international civil servants, and serious misconduct."

The Applicant was requested to submit, within ten days of his receipt of the memorandum, any written statement or explanation he might wish to make on the matter; he could, for that purpose, avail himself of the assistance of a member of the Panel of Counsel or any other staff member. In a reply dated 21 June 1988, the Applicant recognized that he had been discovered in the act of filling out a United Nations Laissez-Passer in his name and gave the following explanation of his "foolish rather than criminal or dishonest act":

> "...
>
> (a) I told my colleague Mr. Benitez whom I considered a friend, that I wanted to have a personal memento of my service with the United Nations, for the years after I retired. I did this when I asked him for the use of the special typing machine. I also told him that in filling out the document in my name I would also immediately put the cancellation stamps on it and cut the edges to let it appear as an out-of-service

Laissez-Passer. What I wanted was something that I could keep with me in India after retirement to remind me that I had worked for the United Nations. One might say that this desire on my part was probably attributable to the humble nature of my service as a registry clerk and an unconscious quest for some form of self-recognition.

(b) Mr. Benitez, after arranging for me to use the typing machine, also became part of a scheme to entrap me. I was thus discovered in the act of typing up the Laissez-Passer. Had they waited until I had finished, they would have seen that I would have immediately put on the cancellation stamps and cut off the edges of the Laissez-Passer.

7. They knew through Mr. Benitez that I intended to fill in the Laissez-Passer, as a personal memento for my post-retirement years. Believing that this was wrong, should they not have tried to stop me from going ahead with my act by warning me discreetly, or cautioning me about the risks that I would incur if my intention were construed in a dishonest light as would be expected in an Organization vowed to defend principles of human rights and tolerance? Instead Mr. Benitez called me at home after 18h00 inviting me to come to the office to perform what to all intents and purposes was a wrong act. Such action is reprehensible from a humane point of view. I consider myself to be an honest person. At no time did I have the intent to defraud the Organization or commit any form of misrepresentation. My conception of my act was that it would cause harm to no one.

..."

The Applicant's case was brought before the Joint Disciplinary Committee in Geneva on 26 September 1988. In its consideration of the case, the Joint Disciplinary Committee heard the Applicant, his counsel, the representative of the Administration and five witnesses, including Mr. Benitez. In its report, submitted on 24 November 1988, the Committee concluded that there had been misconduct on the part of the Applicant as he had "retained illegally and willfully an official red United Nations Laissez-Passer" and had "fraudulently manufactured in his own name and for his own use a red United Nations Laissez-Passer". After identifying several aggravating and several attenuating factors, the Committee reviewed all possible disciplinary measures. Its conclusions and its recommendation read as follows:

"A. Conclusions

38. The Committee concludes that dismissal would be an appropriate disciplinary measure only in the event of actual, lasting and frequent misuse of the Laissez-Passer, which was not the case. A written censure would appear inappropriate as well, because of the official character of the document and the potential discredit that even a limited use of the Laissez-Passer could have caused the Organization. A financial penalty, i.e. suspension without pay, appeared too passing and superficial a disciplinary measure; indeed, the offense has been less in terms of property than in terms of confidence.

B. Recommendation

39. Considering the above, particularly the breach of confidence which suggests a lack of maturity and trustworthiness, the Committee recommends that Mr. Dey be demoted to the next lower grade, at the same step."

On 3 January 1989 the Under-Secretary-General for Administration and Management informed the Applicant that, having re-examined his case in the light of the Joint Disciplinary Committee's report and having also noted observations made by the Committee concerning the Administration's role in the recovery of the Laissez-Passer, the Secretary-General had decided to dismiss him for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(b) with effect from the date of receipt of the communication; the Secretary-General had also decided to pay the Applicant an indemnity of half of his termination indemnity entitlement pursuant to Annex III (a) and (c) of the Staff Regulations. On 28 February 1989 the Applicant lodged an appeal with the Joint Appeals Board in Geneva, which submitted its report on 4 January 1990. The Board's conclusions and recommendation read as follows:

"Conclusions and Recommendation

59. In view of the foregoing, the Panel concludes that:

(a) there is no reason to reconsider the decision of the Secretary-General to dismiss the Appellant for misconduct since there is substantial evidence that he committed acts which did not befit his status as an international civil servant;

(b) the Secretary-General's decision to dismiss the Appellant for misconduct was justifiable on the basis of the evidence in the case;

(c) the decision to dismiss the Appellant for misconduct was taken after the Appellant had been accorded full rights of due process.

60. Moreover, the majority of the Panel concludes that the decision to dismiss the Appellant for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(b) was a proper exercise of the Secretary-General's discretionary authority, and that the contested decision was not tainted by mistake of fact, prejudice, arbitrariness or any other extraneous factor.

61. Accordingly, the Panel makes no recommendation in support of the appeal."

The member elected by the staff appended the following dissenting opinion to the Board's report:

"1. While accepting conclusions (a), (b) and (c) of paragraph 59 of the Panel's report, I am unable to associate myself with the general approbation accorded the Administration by paragraph 60, nor do I share the reasoning by which the majority of the Panel justifies the behaviour of the Administration in this affair (...).

2. In my view, rather than engage in speculation as to the comparative shortcomings of the various alternative methods which the Administration might have employed to recuperate the UNLP in question, the Panel had simply to consider the facts. And the facts indicate that the Administration, by its own behaviour, that is to say in effectively encouraging the Appellant to commit his ultimate fault, itself acted in violation of the standards which it requires to be upheld, and thereby incurs part of the responsibility in the matter.

3. To gloss over the role of the Administration is to imply that the end justifies the means, which is hardly a formula compatible with justice."

On 11 January 1990 the Officer-in-Charge of the Department of Administration and Management informed the Applicant that, having re-examined his case in the light of the Joint Appeals Board's report, the Secretary-General had decided to maintain the contested decision. On 5 July 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to give any, or sufficient, reason for dismissing the Applicant in the face of the reasoned recommendation of the Joint Disciplinary Committee against dismissal.

2. The Under-Secretary-General for Administration and Management, who took the decision to dismiss the Applicant, had a blatant conflict of interest inasmuch as it was the conduct of senior officers in his Department who were found by the Joint Disciplinary Committee to have engaged in entrapment of the Applicant and to have been in breach of the very standards of conduct the Applicant was accused of infringing.

Whereas the Respondent's principal contentions are:

1. The United Nations Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets those standards.

2. The decision to dismiss the Applicant was properly motivated and did not violate the rights of the Applicant.

3. Dismissal is an appropriate penalty for the theft and falsification of a red United Nations Laissez-Passer.

The Tribunal, having deliberated from 14 to 21 October 1991, now pronounces the following judgement:

I. The Applicant appealed against the Respondent's decision to dismiss him for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3 (b) instead of demoting him as recommended by the Joint Disciplinary Committee. The Tribunal notes that the Secretary-General decided at the same time to pay the Applicant an indemnity of half of his termination indemnity entitlement pursuant to Annex III (a) and (c) of the Staff Regulations.

The misconduct arises from alleged fraudulent acts of the Applicant in connection with a red United Nations Laissez-Passer.

II. The Joint Disciplinary Committee, having examined the facts and the evidence as well as the written and oral testimonies of witnesses, including those of the Applicant and his counsel, concluded that there was misconduct on the part of the Applicant as he had:

(a) Retained illegally and willfully a red United Nations Laissez-Passer; and

(b) Fraudulently manufactured in his own name and for his own use a red United Nations Laissez-Passer.

III. With regard to the appropriate sanction, the Joint Disciplinary Committee, after reviewing all possible disciplinary measures, discarded dismissal as inappropriate and recommended demotion to the next lower grade, at the same step, in view of the breach of confidence suggesting a lack of maturity.

IV. The Joint Appeals Board, for its part, concluded after reviewing the case that there was substantial evidence that the Applicant had committed acts not befitting his status as an international civil servant, which justified the Secretary-General's decision to dismiss the Applicant for misconduct.

V. The Tribunal has consistently held that:

1. The Secretary-General has broad discretion in disciplinary matters, including determination of what constitutes misconduct as well as the appropriate sanction;

2. The reports of the Joint Disciplinary Committee and the Joint Appeals Board are only advisory. The Respondent is entitled to reach a different conclusion from theirs after consideration of all the facts and circumstances of the case;

3. The Tribunal, however, may review the Respondent's decision if such a decision is based on an error of fact or of law, or is arbitrary or motivated by prejudice or by other extraneous considerations.

VI. The Applicant's main objection to the contested decision is the severity of the disciplinary measure. The Applicant considers that the punishment does not fit the crime and that the proper course would be to reverse the decision to dismiss him, and to implement the recommendation of the Joint Disciplinary Committee.

The Tribunal has to examine whether the decision taken by the Secretary-General was tainted by error of facts or of law, lack of due process, arbitrariness, prejudice or other extraneous considerations.

VII. The Tribunal notes first that the Applicant does not deny the facts constituting the misconduct. He admitted his wrongdoing and repeatedly apologized for it. The facts were also established by the Joint Disciplinary Committee and were not disputed. The Tribunal agrees with the Joint Appeals Board's conclusion that the contested decision was not based on a mistake of fact.

VIII. Having examined carefully the circumstances of the case, the Tribunal also does not find any evidence that the Respondent's decision was tainted by prejudice or extraneous considerations.

IX. With regard to the lack of due process, the Tribunal notes at the outset the Joint Appeals Board's conclusion that the Applicant was accorded due process during the proceedings of the Joint Disciplinary Committee and before the contested decision was taken by the Respondent.

X. The Applicant claims nevertheless that in rejecting demotion as recommended by the Joint Disciplinary Committee in favour of dismissal, the Respondent failed to take into consideration all the facts and circumstances of the case without giving specific reasons, and therefore that the decision was arbitrary.

In order to evaluate that argument, the Tribunal will analyse the facts and circumstances relating to the two charges made against the Applicant.

XI. In the Tribunal's view, the controversy between the Applicant and the Respondent about the severity of the disciplinary measure arose from the way the Applicant and his counsel approached the case. In their approach, they focussed their attention and much of their argumentation on the second charge, which they probably considered the most serious but at the same time the easiest to refute. The Applicant's counsel, for example, did not hesitate to say before the Joint Appeals Board that the only correct charge to be brought against the Applicant should be "the improper possession of the document", as if this first charge was of minor gravity, which was not the case as it will be explained later.

XII. The Tribunal observes moreover that the Applicant and to a certain extent the Joint Disciplinary Committee, while concentrating on the second charge, seem to have perceived it from a purely criminal point of view, where the elements constituting the crime must be found and fully established in order to assess the culpability of the accused and consequently determine the appropriate sanction. Thus with regard to the element of intent, the Applicant claims that there was no criminal intent, but harmless naïve intent. The laissez-passer in question was unusable because technically defective and in any event there was no actual use of the fabricated laissez-passer, because the Applicant was stopped from completing the fabrication. Moreover, the Applicant argues that the contributory role of the Administration in the performance of the wrongdoing must diminish his culpability.

XIII. The Tribunal considers that such an approach has two fundamental flaws. Firstly, it stressed the criminal aspects of the second charge as if dismissal was a punishment for a crime, and thus ignored the administrative side of the fabrication charge, which is very pertinent. Even if all the criminal aspects of the fabrication charge are left aside for the sake of argument, there is no doubt that, from an administrative point of view, this sad episode had left serious scars on the behaviour of the Applicant as an international civil servant.

XIV. Indeed the Tribunal finds, with regard to this second charge, that the Administration was faced with a staff member who:

(1) After 16 years of service had no hesitation to enlist the assistance of a colleague to perform an illegal act and, as the Joint Disciplinary Committee stated in its report, "seemed to have disregarded the negative consequences upon his colleague in drawing him into an illegal action";

(2) Showed a readiness to carry out his illegal scheme when the Administration tested him to verify his declarations and his intentions, and only expressed regret after he was caught;

(3) Asserted, at 48 years of age with 12 more years to go before mandatory retirement from the Organization, that he wanted a personal memento of his years of service, an assertion hard to believe, as stated by the Joint Disciplinary Committee, and in any case not justifiable.

These acts may not constitute an offence in the criminal sense but definitely denote a behaviour which lacks maturity, seriousness and honesty and therefore a behaviour not befitting an international civil servant.

XV. The second flaw in the Applicant's approach to the case is that he missed the fact that what was involved in the first charge was a very serious matter. The Tribunal, after analyzing the first charge, finds as follows:

1. Although the formulation of the first charge speaks of the illegal and willful retention of a red United Nations Laissez-Passer, the truth is that before the act of retaining, the Applicant committed the act of removing the Laissez-Passer from the possession of the United Nations into his possession, which is undoubtedly a theft.

2. This theft is moreover aggravated by the nature of the stolen document. It is not an ordinary document of passing interest or an ordinary means of identification such as a ground pass, but an official United Nations travel document issued by the Secretary-General pursuant to the Convention on the Privileges and Immunities of the United Nations for use only in connection with official travel. Its credibility must therefore be maintained at all times and everywhere for the safety and security of its

authorized holders and in order to avoid any unnecessary misunderstanding or friction between the Organization and Members States.

XVI. Apart from the importance and value of the document, the Tribunal makes the following comments with regard to the behaviour of the Applicant concerning the first charge:

1. Having worked for four years in the Visa Subunit and being familiar with its work and the regulations governing the Laissez-Passer, the Applicant took advantage of his official capacity to appropriate a Laissez-Passer with enhanced immunities and privileges and deliberately kept it for a number of years without ever thinking of destroying it or giving it back. On the contrary, he manifested his intention to use it for his own benefit at the right time.

2. In the midst of an investigation into allegations of procedural errors committed by him, the Applicant stated in September 1987 that he had always carried out his duties honestly, which was not true since he had retained for himself a United Nations Laissez-Passer he should not have had in the first place.

XVII. The Tribunal finds that the Applicant's behaviour with regard to the first charge is flawed by a breach of confidence, lack of trustworthiness and again lack of honesty.

XVIII. The Secretary-General made a determination that the Applicant's misconduct was incompatible with his continued service with the United Nations. Contrary to the Applicant's assertions, the Tribunal finds that this determination has been arrived at taking into account all the facts and circumstances of the case. The Applicant's claim in this regard is therefore without merit.

XIX. The Applicant also contends that in overriding the recommendation of the Joint Disciplinary Committee, the Respondent should have stated the reasons of his decision. The Tribunal notes that the Secretary-General has

opted for dismissal rather than demotion after re-examining the case in the light of the Joint Disciplinary Committee's report. There are, in that report, ample reasons for the Secretary-General to decide to dismiss the Applicant. The Tribunal finds that the determination of the Secretary-General in this respect was not arbitrary, but reasonable and justified by the nature of the fabricated document and the behaviour of the Applicant with regard to both charges.

XX. Finally, the Tribunal remarks that there was no machination on the part of the Administration against the Applicant. The initiative of the fabrication came from the Applicant himself. The Administration went along with him to ascertain his declarations and intentions in view of the past history of disappearance of United Nations Laissez-Passer from the office where the Applicant had worked previously.

XXI. The Tribunal concludes that the decision to dismiss the Applicant was not flawed by an error of fact or of law, lack of due process or arbitrariness, or motivated by prejudice or other extraneous considerations, and was therefore a proper exercise of the Secretary-General's discretionary authority.

XXII. For the foregoing reasons, the application is rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Luis de POSADAS MONTERO
Member

New York, 21 October 1991

Jean Hardy
Acting Executive Secretary